

KING & SPALDING

Business Lit Ledger



In this Fall issue of our newsletter, you will find a review of several significant legal developments. For example, our antitrust group reviews actions taken by the Federal Trade Commission and the Department of Justice noting a new trend in which the government is relying on theories of loss of potential competition or narrow product market definitions. Our class action team provides a commentary on a new wave of class action litigation relating to discount and continuous sales, our securities litigation group addresses new changes in Delaware law relating to fee-shifting and forum selection, and an important recent D.C. Circuit case is discussed which addresses the attorney-client privilege in the context of an investigation. As always, we hope that you will find this issue of our newsletter to be helpful and informative. Our national business litigation team handles every variety of commercial dispute in virtually every jurisdiction in the country. We are committed to being the most trusted, value-added, and service driven choice of counsel for our clients.

Robert Meadows
King & Spalding National Business Litigation Team Leader

Important Legal Developments

Delaware Legislature Just Says "No" To Fee-Shifting, "Yes" To (Delaware) Forum-Selection Bylaws For "Internal Corporate Claims"

The Delaware Legislature recently enacted amendments to Delaware's General Corporation Law that resolve spirited debates between the bench and bar over the enforceability of fee-shifting bylaws and forum selection bylaws. The legislation, which took effect August 1, 2015, prohibits companies incorporated in Delaware from adopting "loser pays" fee-shifting bylaws applicable to "internal corporate claims" but permits bylaws selecting Delaware (but not another state) as the exclusive forum for litigation of such claims. [More »](#)

Federal Trade Commission and Department of Justice Bringing Novel Antitrust Merger Challenges

Over the past several years, the Federal Trade Commission and Department of Justice, Antitrust Division (DOJ) have not shied away from litigating merger challenges. Although many of these actions have been relatively straightforward "structural cases" involving an alleged loss of ongoing, head-to-head competition between the merging parties in a well-understood antitrust product market, a number of these cases have advanced, with varying degrees of success, novel arguments. For example, recent cases have involved theories relying on loss of

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Client Victories

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King & Spalding Wins Dismissal of \$1.5 Billion Class Action Against Former ATP Oil & Gas Corp. Officers [More »](#)

Publications and Presentations

King & Spalding Medical Device Summit 2015 took place on September 29-30 in Chicago, with presentations by Meghan Magruder and Phyllis Sumner, among other distinguished faculty [More »](#)

Illinois Federal Appeals Court Recognizes for the First Time the FTC's Authority to Enforce Cybersecurity Practices [More »](#)

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potential competition or on very narrow product market definitions. Companies considering mergers should take note of these recent developments in enforcement and ensure that their antitrust analysis and defense strategy takes new theories into account. Three recent cases demonstrate how serious the agencies are in using these theories in litigation. [More »](#)

D.C. Circuit Upholds Privilege Claims Regarding Internal Investigation Documents.

On August 11, 2015, the D.C. Circuit issued an opinion in *In re: Kellogg Brown & Root, Inc.*, 1:05-cv-1276, No. 14-5319 (D.C. Cir., Aug. 11, 2015), granting KBR's petition for writ of mandamus and vacating a district court order which held that KBR had implicitly waived privilege by (1) allowing its Rule 30(b)(6) witness to review privileged internal investigation documents in preparation for his deposition and (2) placing the privilege "at issue" in the litigation. The opinion also vacated a second district court order which found that the plaintiff had shown substantial need for the information in portions of the privileged documents that constituted fact work product. [More »](#)

Retailers Face Class Action Risk From "Phantom Discount" and "Continuous Sale" Claims

National retailers, including companies like Kohl's, Sears, and Justice, are facing a wave of class litigation relating to discount sales and pricing practices. Plaintiffs have attacked two main practices that they allege violate consumer protection laws: (1) advertising that products are "on sale" on a near-continuous basis, i.e., that the purported "sale" is not the temporary reduction in price promised; and (2) comparing a product's offer price to another price (usually MSRP or the "former" price) when the comparison price does not actually represent a regularly offered market price so that the lower offer price is based on a "phantom discount." [More »](#)

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